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Judicial Sponsored Gentrification of the District of Columbia: The Tenant Opportunity to Purchase Act

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JUDICIAL SPONSORED GENTRIFICATION OF THE DISTRICT OF COLUMBIA: THE TENANT OPPORTUNITY TO PURCHASE ACT

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I. INTRODUCTION

The revitalization of inner city, low-income, and neglected neighborhoods is an increasingly prevalent urban development trend that produces benefits, but at major social costs.¹ The adverse social effects of revitalization and urban development practices reflect a nationwide housing crisis from which the District of Columbia is not immune.² In fact, the District of Columbia is a prime example of a city struggling to overcome the negative effects of revitalization and development.³ The most problematic of these urban development practices is the conversion of rental housing into expensive condominiums.⁴

1. See Michael Allen Wolf, *HUD and Housing in the 1990s: Crises in Affordability and Accountability*, 18 FORDHAM URB. L.J. 545, 550-51 (1991) (attributing homelessness to a decrease in affordable housing in revitalized neighborhoods).

2. See Judith Bernstein-Baker, *Cooperative Conversion: Is it Only for the Wealthy? Proposals That Promote Affordable Cooperative Housing in Philadelphia*, 61 TEMP. L. REV. 393, 393 (1988) (noting that the large amount of families on waiting lists for public and low-income housing is indicative of a housing emergency); Christopher A. Seeger, Note, *The Fixed-Price Preemptive Right in the Community Land Trust Lease: A Valid Response to the Housing Crisis or an Invalid Restraint on Alienation?*, 11 CARDOZO L. REV. 471, 471 (1989) (characterizing the national housing crisis as a “serious shortage” in affordable housing followed by extreme competition over the minimal amount of available affordable housing).

3. See, e.g., John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”:* *Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 458-59 (2003) (using statistics that demonstrate an exodus of low-income families due to the demolition of public housing complexes). *But see generally* J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405 (2003) (listing the positive outcomes of gentrification to include increases in property values, and thus tax revenues, as well as employment opportunities due to new retail and public education improvements).

4. See Adrienne Decuire, Edward Davis & Tamar Meekins, *The Nightmare on Main Street for African-Americans: A Call for a New National Policy Focus on Homeownership*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 262, 271 (2008) (describing the “rapid” transformation of the District of Columbia into “Condo City” as “another loss”); Robert Chambers, Comment, *Pushed Out: A Call for Inclusionary Housing Programs in Local Condominium Conversion Legislation*, 42 CAL. W. L. REV. 355, 376 n.1 (2006) (defining conversion as the practice of “changing” rental apartment

The District of Columbia's recent urban development triggered a widespread gentrification movement.⁵ A common result of conversion, "gentrification" refers to the process of renovating "run-down neighborhoods" to revitalize them and make them attractive to more affluent residents.⁶ Gentrification disproportionately impacts vulnerable populations; generally, these populations are low-income minority tenants who are unable to afford the higher rents of converted apartments.⁷ Revitalization projects leave these victims of gentrification to suffer the negative effects and battle the debilitating social costs of urban development practices.⁸

This Comment argues that poorly enforced conversion controls facilitate the District of Columbia's housing crisis, despite multiple combative legislative efforts, and that judicially imposed standards prevent tenants from benefiting from legislative protections that aim to insulate low-income populations from the negative social effects of urban development.⁹ Part II examines legislative efforts to address the District of Columbia's housing crisis through the promulgation of the Tenant Opportunity to Purchase Act ("TOPA") and TOPA's recent amendments, and defines TOPA's judicial standard.¹⁰ Part III argues that the current judicial standard regulating TOPA is flawed because the District of Columbia Court of Appeals ("Court of Appeals") misinterprets the law, analyzes the negative impact of the improper standard, and explains how the judiciary has defeated the purposes of TOPA.¹¹ Part IV advocates for a new standard

buildings to condominiums).

5. See Powell & Spencer, *supra* note 3, at 451 (remarking that revitalization is a form of "exclusive" development uniquely designed to ostracize low-income tenants from their homes and neighborhoods to make space for affluent tenants).

6. See Ryan Howell, Note, *Throw the "Bums" Out? A Discussion of the Historic Preservation Statutes on Low-Income Households Through the Process of Urban Gentrification in Old Neighborhoods*, 11 J. GENDER RACE & JUST. 541, 555 (2008) (defining gentrification as a process beginning with the renovation of run-down neighborhoods, followed by the migration of professionals into these renewed deteriorating areas, and ending in the displacement of poorer residents).

7. See Byrne, *supra* note 3, at 409 (pointing out that the District of Columbia's gentrification movement is unique as it exclusively involves white residents displacing black residents).

8. See Jonathan Feldman, *Regulating Condominium Conversions: The Constitutionality of Tenant Approval Provisions*, 21 URB. LAW. 85, 86 (1989) (emphasizing that the effects of conversion, including the lack of affordable housing, multiply when neighborhoods undergo contemporaneous gentrification).

9. See *infra* Part I (introducing the contributing causes of the District of Columbia's housing crisis).

10. See *infra* Part II.A (setting forth TOPA's provisions, scope, and requirements).

11. See *infra* Part III.A-D (laying out the judiciary's improper foundation for interpreting the statute, analyzing two cases from the District of Columbia Court of Appeals that illustrate the flaws of the current judicial standard, and articulating the adverse effects of the Court of Appeals' misguided analyses).

that will effectively combat the continuing housing crisis in the District of Columbia.¹² Part V concludes that TOPA, if broadened, has the potential to effectively regulate conversion and protect tenants from the negative effects of development.¹³

II. BACKGROUND

A. *The Tenant Opportunity to Purchase Act*

1. *The District of Columbia's Affordable Housing Crisis and the Legislative Reaction*

The District of Columbia is battling a nearly two decade-long housing crisis that largely results from revitalization projects, a confluence of developmental practices such as conversion, and the negative effects of gentrification.¹⁴ The most disturbing social effects of conversion impact vulnerable populations and include involuntary displacement of tenants, depletion of available affordable rental housing, and rapidly increasing housing costs.¹⁵

The District of Columbia City Council ("Council") originally promulgated TOPA in 1980 to address the District's housing crisis.¹⁶ The Council envisioned TOPA as a statutory tool to counter the negative impacts of development and gentrification on the vulnerable, low-income tenant population.¹⁷ Thus, the overarching goals of TOPA are to prevent wholly, or at least minimize, involuntary tenant displacement resulting from the conversion of rental property and to strengthen and protect tenants' rights.¹⁸ To further its designated purposes and alleviate the

12. See *infra* Part IV (explaining how the housing crisis will continue to persist without either judicial or legislative action).

13. See *infra* Part V (calling for action to be taken to spur positive change and address the housing crisis).

14. See Lynn E. Cunningham, *Legal Needs for the Low-Income Population in Washington, D.C.*, 5 UDC/DCSL L. REV. 21, 29-30 (2000) (observing that approximately 7,000 households are waitlisted and 41,000 households are living at or below the poverty level, yet there are only 30,000 low-income housing units available).

15. See Powell & Spencer, *supra* note 3, at 458 (interviewing low-income African-Americans in the District of Columbia who believe gentrification forced them out of their neighborhoods, as they did not have any control over the development process).

16. See Rental Housing Conversion and Sale Act of 1980, D.C. CODE §§ 42-3401.01(a)(7), 42-3401.02 (2001 & Supp. 2010) (enacting TOPA to combat the costs associated with urban development by stringently controlling conversion to effectively preserve rental housing).

17. See Bernstein-Baker, *supra* note 2, at 404 (noting that legislative mechanisms, such as statutory provisions guaranteeing tenants a right of first refusal, both allow tenants to remain in their homes and protect tenants from forced displacement and other detrimental effects of conversion).

18. See Sale Act § 42-3401.02 (listing the statutory purposes of TOPA to include

adverse effects of the District of Columbia's housing crisis, TOPA regulates the sales of all rental housing accommodations by restricting the right of housing owners to transfer property freely.¹⁹

2. Subsection (a): *The Scope of TOPA*

Subsection (a) codifies tenants' statutory right of first refusal.²⁰ TOPA obligates all rental housing owners to give their tenants the opportunity to purchase their rental housing unit before the owner sells the rental property to a third party.²¹ This right is only triggered when the rental housing owner attempts to "sell" the rental housing.²² However, subsection (a) does not define what a "sale" is.²³

3. Subsections (b) and (c): *Two Overly Narrow Definitions of "Sale"*

Unlike subsection (a), subsections (b) and (c) clearly define two ways in which a transfer is a "sale" within the meaning of TOPA. Subsection (b) categorizes a transfer pursuant to a written agreement as a "sale" if the agreement possesses certain enumerated requirements.²⁴ Subsection (c) explicitly construes as a "sale" the transfer of a 100% ownership interest in a business association to an individual third party.²⁵

discouraging tenant displacement due to conversion, preserving affordable rental housing, and balancing the "sometimes conflicting goals" of developers with the need to protect low-income tenants).

19. *See id.* § 42-3401.03(11) (defining "housing accommodation" or "accommodation" to be any form of rental housing with one or more units); *see also* Chambers, *supra* note 4, at 376 (articulating that resale restrictions help ensure affordable housing remains so for low-income tenants despite the contemporaneous conversion of neighboring units).

20. *See* Tenant Opportunity to Purchase Act (TOPA), D.C. CODE § 42-3404.02(a) (2001 & Supp. 2010) (requiring that rental housing owners provide tenants the opportunity to purchase their rental housing accommodation prior to any "sale").

21. *See id.* (codifying the tenants' right of first refusal to purchase the property prior to sale).

22. *See id.* (limiting the scope of TOPA to the sale of a housing accommodation); *see also* Victoria A. Judson, *Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion*, 18 HARV. C.R.-C.L. L. REV. 179, 228 (1983) (explaining that statutory resell restrictions protect tenants, rather than outside parties seeking an "economic gain" from the purchase of rental housing).

23. *See, e.g.*, Reply Brief for Appellees/Cross-Appellants at 12, *Twin Towers Plaza Tenants Ass'n v. Capital Park Assocs.*, 894 A.2d 1113 (D.C. 2006) (Nos. 04-CV-1534, 04-CV-1575) (asserting that rental housing owners are only required to respect the tenant's right of first refusal if the transfer constitutes a "sale" that meets the 100% ownership interest test because TOPA applies to "sales" and not to non-sale transfers).

24. *See* TOPA § 42-3404.02(b) (defining as a "sale" any agreement whereby the rental housing owner relinquishes possession of the property, assigns to the other contracting party all rights relating to the property, and requires the other contracting party to pay property taxes and to maintain property insurance).

25. *See id.* § 42-3404.02(c) (including within the definition of "sale" transfers of 100% interest in a partnership or corporation that owns a rental housing accommodation to one outside transferee).

Thus, as originally written, a transfer is automatically a “sale” under TOPA if it falls within the parameters of “sale” explicitly codified in subsections (b) or (c).²⁶ However, a major issue arises if subsections (b) and (c) are inapplicable because the transfer then falls within subsection (a), which fails to define a “sale.”²⁷

B. Defining “Sale”: A Judicial Standard

The lack of a clear statutory definition of “sale” has already prompted a wave of tenant-driven litigation.²⁸ Lawsuits have charged rental housing owners with TOPA violations arising from the alleged “sales” of rental properties without first providing the tenants an opportunity to purchase.²⁹ The influx of TOPA-based suits and lack of a statutory definition of “sale” within subsection (a) of TOPA forced the Court of Appeals to delineate TOPA’s scope.³⁰

1. An “Absolute and General” Transfer

TOPA litigation first reached the Court of Appeals in 1994 when, as a matter of first impression, the Court of Appeals defined “sale” in *West End Tenant Association v. George Washington University* as only those conveyances resulting in the transfer of “absolute title.”³¹ Throughout the following decade, the Court of Appeals applied the *West End* definition of “sale” to multiple types of transfers and ultimately produced a line of

26. See *id.* § 42-3404.02(b)-(c) (stating that the definition of “sell” or “sale” encompasses transfers codified within subsections (b) and (c)).

27. See *id.* § 42-3404.02(a) (failing explicitly to define “sale” but mandating that all “sales” trigger a tenant’s opportunity to purchase right).

28. See generally Aaron O’Toole & Benita Jones, *Tenant Purchase Laws as a Tool for Affordable Housing Preservation: The D.C. Experience*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 367 (2009) (noting that there are ambiguities within TOPA’s regulatory regime and scope because the definition of “sell” or “sale” lacks clarity).

29. See *Twin Towers Plaza Tenants Ass’n v. Capital Park Assocs.*, 894 A.2d 1113, 1115-16 (D.C. 2006) (claiming that the owner of the Twin Towers rental apartment building violated TOPA when he transferred the majority of his ownership interest to a third party without providing the tenants the opportunity to purchase the property); *W. End Tenant Ass’n v. George Washington Univ.*, 640 A.2d 718, 721 (D.C. 1994) (claiming that the rental housing owner contravened the tenants’ statutory right to purchase by failing to provide tenants the right of first refusal before transferring a portion of his ownership interest to an outside party).

30. See *West End*, 640 A.2d at 727-28 (defining the word “sale” to mean the “passing of the general and absolute title, as distinguished from a special interest falling short of complete ownership”).

31. Compare *id.* at 727 (defining sale as a “contract whereby property is transferred from one person to another for a consideration of value, implying the passing of the general and absolute title”), with *Twin Towers*, 894 A.2d at 1119 (distinguishing “sale” as defined in *West End* from a transfer of a “special interest falling short of complete ownership”).

holdings that articulated tests to aid in the determination of whether a “sale” occurred for the purposes of TOPA.³²

The Court of Appeals in *Twin Towers Plaza Tenants Association v. Capital Park Associates, L.P.* applied the *West End* definition of “sale” to transfers falling within subsection (a) of TOPA.³³ Applying an “absolute transfer” standard, the Court of Appeals held that transfers of less than an owner’s entire interest in property fall short of complete ownership and do not meet the requirements of a “sale,” as a “sale” within the meaning of subsection (a) only pertains to conveyances that effectuate the passing of “general and absolute title.”³⁴ However, in 2009, in *Gomez v. Independence Management of Delaware, Inc.*, the Court of Appeals applied the absolute transfer standard less restrictively while recognizing that a transfer of 99% ownership interest could be a “sale” within the meaning of subsection (a) of TOPA.³⁵

2. A “Change in Ownership”

The Court of Appeals in *Wallasey Tenants Association v. Varner* further clarified the *Twin Towers* “absolute transfer” test by requiring that conveyances of rental housing accommodations effectuate a change in complete ownership.³⁶ The court emphasized the importance of a change in ownership, as evidenced by the *Wallasey* per se requirement that a “sale” must be made to an unrelated third party.³⁷ This principle surfaced again in *Alcazar Tenants’ Ass’n v. Smith Property Holdings, L.P.* when the Court of Appeals affirmed that merely “moving property around” or restructuring the form of ownership is not a “sale” within the meaning of TOPA.³⁸

32. See *Wallasey Tenants Ass’n v. Varner*, 892 A.2d 1135, 1140-41 (D.C. 2006) (requiring negotiations between third parties to trigger the right of first refusal if individual economic gain, rather than legitimate business motives, prompted the transfer); *Twin Towers*, 894 A.2d at 1119 (requiring “sales” to result in the “absolute transfer” of ownership for consideration).

33. See *Twin Towers*, 894 A.2d at 1120 (holding that the transfer of 95% ownership interest in a rental housing complex to a third party was not a “sale” within the meaning of TOPA because it is neither a transfer of absolute title nor a conveyance resulting in the transfer of the owner’s entire interest).

34. See *id.* at 1119 (reiterating that failing to convey the entire ownership interest and title in rental housing does not effect an “absolute transfer” as contemplated by *West End* and thus does not trigger TOPA).

35. 967 A.2d 1276, 1283 (D.C. 2009) (recognizing that the transfer may have been a “sale” under subsection (a) if the transferee was the sole owner of the transferor at the time of the transfer).

36. See *Wallasey*, 892 A.2d at 1140 (holding that the transfer of property from one owner to a separate legal entity wholly owned by the original owner is not a “sale,” as this is merely a change in the *form* of ownership but not in actual ownership).

37. See *id.* at 1140-41 (establishing that the transfer of property from a grantor, or the original owner, to an entity wholly owned by the grantor is not a “sale” under TOPA because the conveyance does not result in a “change of ownership or control”).

38. See 981 A.2d 1202, 1206-07 (D.C. 2009) (holding that the transfer of property

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Additionally, the unrelated third party must also engage in bargaining or “arms-length” dealings prior to the conveyance.³⁹ *Wallasey* established a general exemption from TOPA that precludes transfers effectuated for the purposes of “business convenience.”⁴⁰

Subsection (b) governs transfers pursuant to a written agreement or lease, and the standard for determining whether a “sale” occurred in under subsection (b) differs from subsection (a)’s “absolute transfer” or change in complete ownership test and is articulated in *Columbia Plaza Tenants’ Ass’n v. Columbia Plaza Limited Partnership*.⁴¹ A transfer of ownership interest pursuant to an agreement must result in a change in the “fundamental control of ownership” of the rental housing accommodation.⁴² In subsequent cases, the Court of Appeals required evidence of a general “relinquishment of possession” of the property to be present before finding changes in the “fundamental control of ownership.”⁴³

C. 2005 Amendments

Prompted by the perpetual housing crisis, the Council amended TOPA in 2005 to combat the crisis more effectively by both broadening the scope of the term “sale” and attempting to cut against judicially created standards.⁴⁴ The 2005 amendments made three changes.

First, TOPA now categorizes any agreement as a “sale” if it mirrors the terms of the transfer and agreement in *West End*.⁴⁵ Second, the transfer of

from Smith Property Holdings to a trust entirely controlled and owned by Smith Property Holdings was not a “sale” because it only changed in the form of ownership).

39. See *Wallasey*, 892 A.2d at 1140-41 (rationalizing the need for “arms’ length dealings” to ensure the transfer constituted a sale within an “open market,” rather than being a product of compulsion or forcing an owner to sell or buyer to buy against his or her volition).

40. See *id.* at 1140 (pronouncing the per se rule that TOPA is not applicable when property is conveyed for the legitimate purposes of estate planning, tax restructuring, limiting liability, or general property management).

41. See generally 869 A.2d 329 (D.C. 2005) (recognizing that TOPA governs conveyances resulting in a change in control not necessarily a change in complete ownership).

42. See *id.* at 335-36 (holding that an agreement in which the owner conveys to a third person the right to use, occupy, and control a portion or all of the housing accommodation may be a sale, as it would likely result in a fundamental change in control or ownership).

43. See *id.* (recognizing that for a written agreement to be construed as a sale under TOPA prior to the 2005 amendments, the agreement must result in the owner “relinquishing possession of the property”).

44. See Tenant Opportunity to Purchase Act (TOPA 2001), D.C. CODE § 42-3404.02 (2001), amended by Rental Housing Conversion and Sale Amendment Act of 2005 (Amended TOPA), D.C. CODE § 42-3404.02 (2001 & Supp. 2010) (retaining the three original subsections yet slightly changing the definition of “sale”).

45. See Amended TOPA § 42-3404.02(b) (defining “sale” as an agreement

any amount of ownership interest in rental property is a “sale” if it results in a transfer governed by subsection (a).⁴⁶

The second change effectively created a cyclical determination of whether a transfer constituted a “sale.”⁴⁷ It requires all transfers, regardless of whether the transfer falls within subsection (b) or (c), to result in a “sale” as contemplated by subsection (a).⁴⁸ However, and most significantly, the 2005 amendments did not change subsection (a); thus, the inquiry of whether a “sale” occurred continues to hinge on the standard of “sale” set forth in subsection (a)—a standard that remains undefined.⁴⁹ Consequently, the Court of Appeals continues to apply its standard as established in *West End* to determine whether transfers constitute a “sale” within the meaning of subsection (a).⁵⁰

The third noteworthy amendment more directly affects the application of TOPA. The 2005 amendments incorporated an express provision that directs courts to examine the substance of the transaction and to consider whether the parties entered into a transaction to avoid the obligation to comply with TOPA’s stringent requirements.⁵¹

III. ANALYSIS

A. A Misunderstood Judicial Standard: The Failure of the Court of Appeals to Understand the Plain Meaning of “Sale”

The judicial definition of “sale” resulted from faulty statutory interpretation. The Court of Appeals made a fundamental error in establishing its standard for “sale” when it failed to recognize that the plain meaning of “sale” does not require an absolute transfer.⁵² Despite correctly

pursuant to which the owner relinquishes possession of the property, extends an option to purchase, assigns all rights, requires the purchaser to pay taxes and purchase insurance).

46. *See id.* § 42-3404.02(c)(1)(B) (encompassing within the definition of “sale” conveyances pursuant to subsection (a)).

47. *Id.* § 42-3404.02(c)(1)(B)(i) (“The transfer of ownership interest in a corporation . . . which owns an accommodation . . . which, in effect, results in the transfer of the accommodation pursuant to subsection (a).”).

48. *See id.* § 42-3404.02(c)(1)(A)-(B) (construing as a “sale” transfers pursuant to a written agreement that meet the requirements of “sale” in subsection (b) and that result in a sale pursuant to subsection (a)).

49. *Compare* Amended TOPA § 42-3404.02, with TOPA 2001 § 42-3404.02(a) (using exactly the same language in both versions of the statute).

50. *See, e.g.,* *Twin Towers Plaza Tenants Ass’n v. Capital Park Assocs.*, 894 A.2d 1113, 1120 (D.C. 2006) (concluding that the 2005 amendments did not nullify the judicial test for “sale” and thus the judicial standard is the viable test).

51. *See* Amended TOPA § 42-3405.03(b) (amending TOPA without affecting the judicial standard as the amendments apply prospectively only).

52. *See* *W. End Tenants Ass’n v. George Washington Univ.*, 640 A.2d 718, 727

identifying the proper methods of statutory interpretation when first construing the term “sale,” the Court of Appeals strayed from those canons of interpretation and failed to adopt the ordinary and common meaning of the word “sale.”⁵³ The *West End* definition of “sale” is derived strictly from Black’s Law Dictionary.⁵⁴ However, the *West End* standard reflects only one of the multiple definitions of “sale” listed in Black’s Law Dictionary.⁵⁵ Furthermore, the most current version of the same dictionary eliminated the definition of “sale” upon which the Court of Appeals so heavily relied and opted for a more fluid and flexible standard.⁵⁶

The Court of Appeals’ exact techniques for construing the plain meaning of “sale,” together with an examination of the same dictionary definition used by the Court of Appeals, clarify that the commonly accepted meaning of “sale” is not strictly limited to transfers of an owner’s entire interest in property.⁵⁷ Yet, the court’s overly restrictive definition of “sale” explicitly exempts from TOPA’s regime all transfers falling short of a conveyance of complete ownership and thus markedly does not exemplify the common meaning of the ordinary word “sale.”⁵⁸ Due to the obviously absurd result produced by a literal and constricted application of the judicial standard, the Court of Appeals neglected its duty to adopt the plain meaning, or at least inquire into whether another meaning would prevent absurdity.⁵⁹

B. An Unintended Judicial Standard: The Failure of the Court of Appeals

(D.C. 1994) (refusing to “look beyond the plain meaning” of unambiguous statutory terms when application of the “plain meaning” defeats statutory goals).

53. See *id.* at 727-28 (defining “sale” as an “absolute transfer”).

54. See *id.* at 727 (inferring, after examining only one edition of Black’s Law Dictionary, a seemingly “universal consensus” that “sale” means an “absolute transfer” of property).

55. See Brief of Appellant/Cross-Appellee in Opposition with Respect to the Cross-Appeal at 5, *Twin Towers Plaza Tenants Ass’n v. Capital Park Assocs.*, 894 A.2d 1113 (D.C. 2006) (Nos. 04-CV-1534, 04-CV-1575) (highlighting that the definition of “sale” used by the Court of Appeals in *West End* is not even the first-listed definition in Black’s Law Dictionary).

56. See *id.* at 5-6 (examining multiple legally-accepted definitions of “sale” to conclude the term’s common meaning is not limited to absolute transfers but contemplates all conveyances of property from one person to another for consideration).

57. See *id.* (highlighting that no other jurisdictions, legal publications, or commentaries define “sale” in such a narrow, inflexible manner that excludes transfers short of complete ownership).

58. See, e.g., *Twin Towers Plaza Tenants Ass’n v. Capital Park Assocs.*, 894 A.2d 1113, 1119 (D.C. 2006) (finding that the transfer of 95% ownership interest is obviously not the same as the transfer of complete ownership interest).

59. See *West End*, 640 A.2d at 726-27 & n.14 (recognizing that courts cannot be permitted to “wallow in literalism” if a term’s literal meaning or most common definition results in absurd consequences the legislature could not have possibly intended, and forbidding the adoption of the plain meaning if use of the word’s plain meaning defeats the statutory goals).

to Effectuate Legislative Intent and to Adhere to TOPA's Mandatory Interpretation Guidelines

The Court of Appeals failed to afford proper deference to legislative history and wrongfully rejected the Council's proposed and intended standard of "sale" for the purposes of TOPA.⁶⁰ Justifying its dismissal of legislative history, the Court of Appeals contended that the Council did not intend for its proposed "fundamental control" standard to govern.⁶¹ However, irrefutable evidence confirms that the Council unmistakably intended for the standard construing "sales" under TOPA to be fluid and flexible—two concepts embodied within the Council's "fundamental control" test.⁶²

The Court of Appeals heard, and subsequently discredited, testimony explicitly evidencing legislative intentions that "sale" signifies a fundamental change in the control of ownership.⁶³ Additional testimony unambiguously illustrates the Council's intention for "sale" to encompass all conveyances that transfer the "benefits of ownership."⁶⁴ The Council indisputably intended for all transfers resulting in a change in the "fundamental control of ownership" to be "sales" for the purposes of TOPA, yet the Court of Appeals' standard of "sale" contravenes this intention.⁶⁵

The Court of Appeals justified ignoring the Council's manifest desire to incorporate the "fundamental control of ownership" standard in TOPA by instead interpreting legislative silence as acceptance of the judicial standard.⁶⁶ Despite evidence to the contrary, the Court of Appeals felt a

60. See *Twin Towers*, 894 A.2d at 1120 (overlooking clear legislative history while proclaiming that a "sale" covers "all changes in fundamental control of ownership").

61. See *id.* (averring that the judicial definition of "sale" from *West End* controls because the Council did not "purport to overrule it," as the amendments failed to adopt express language doing so).

62. See Brief of Appellant/Cross-Appellee in Opposition with Respect to the Cross-Appeal, *Twin Towers*, *supra* note 55, at 11-12 (emphasizing that the Court of Appeals' interpretation of "sale" directly contradicts clear legislative indication that "sale" is a flexible term encompassing any "fundamental changes" in the control of a housing accommodation).

63. See *Columbia Plaza Tenants' Ass'n v. Columbia Plaza Ltd. P'ship*, 869 A.2d 329, 336 (D.C. 2005) (examining testimony asserting that the "fundamental control" concept should not be defined as the transfer of 51% ownership interest but as a larger transfer, such as the transfer of 75% or more).

64. See *id.* at 337 (asserting that a "sale" signifies "relinquish[ing] possession" of property which requires giving up more control than the limited 28% ownership interest transferred in this case).

65. Compare *id.* at 334 (acknowledging that the Council agreed that "sale" encompasses all transfers resulting in changes to the fundamental control of ownership), with *W. End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 727-28 (D.C. 1994) (defining "sale" as an "absolute transfer," not a mere change in the control of ownership of rental housing).

66. See *Twin Towers*, 894 A.2d at 1120 (holding that the absence of language

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“particular lack of clarity” surrounded the “fundamental control” standard, as the Council rejected similar proposed language to TOPA’s amendments.⁶⁷ The court interpreted this rejection as support that the proper standard governing “sales” under TOPA is only met if an absolute and total transfer of ownership interest to a third party occurred, rather than a standard that hinges on a fundamental change in the control of ownership.⁶⁸

Moreover, in overlooking the Council’s clear intentions, the Court of Appeals’ interpretation of TOPA violated the governing rules of statutory interpretation.⁶⁹ The court’s definition of “sale” not only contravenes the more fluid and broader legislative definition of “sale” but also conflicts with the overarching goals of TOPA.⁷⁰ The judiciary failed in its duty to further justice and prevent inequities when it narrowly defined “sale” and ignored clear contrary legislative intentions in *West End*.⁷¹

Following *West End*, the Court of Appeals continued to further *West End*’s restrictive and misunderstood definition of “sale,” prompting a legislative reaction.⁷² For example, the Court of Appeals in *Twin Towers* wrongfully ignored the expressed legislative intent evidenced in TOPA’s amendments and applied *West End*’s rigid and inflexible standard.⁷³ This

evidencing legislative intent in TOPA itself confirms that amendments to TOPA did not overrule the standard of “sale” construed in *West End* and thus the judicial standard remains current and viable).

67. See *Columbia Plaza*, 869 A.2d at 336 (discounting the importance of a proposed amendment to TOPA that would have explicitly included within the term “sale” the transfer of a majority of ownership interest).

68. See *Twin Towers*, 894 A.2d at 1120 (averring that the Council had multiple opportunities to amend the Court’s definition of “sale” as defined in *West End* and its progeny but the Council has not done so, thus, in failing to expressly amend TOPA, the Council has not purported to overrule the judicial standard of “sale”).

69. See *West End*, 640 A.2d at 726 (contradicting canons of statutory interpretation that mandate undefined terms must be defined so as not to contradict clear legislative intent) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

70. See *id.* at 726 n.14 (recognizing that the judiciary’s duty is to remain “faithful more to the purpose [of the statute] than the word” and that all judicially interpreted statutory terms must not be at plain “variance with the policy of the legislation as a whole”) (citing *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543 (1940)).

71. See *id.* at 727 (purporting to interpret “sale” in “accordance with the legislative intent and common understanding to prevent absurdities and to advance justice” but failing to do so).

72. See Brief of Appellant/Cross-Appellee in Response to the Supplemental Brief for the Appellees/Cross-Appellant at 5, *Twin Towers Plaza Tenants Ass’n v. Capital Park Assocs.*, 894 A.2d 1113 (D.C. 2006) (Nos. 04-CV-1534, 04-CV-1575) (asserting that TOPA is misunderstood by the “officials charged with protecting tenants rights” and recognizing the definition of “sale” “has been *misinterpreted* to mean exclusively that a sale can only take place when 100% interest is transferred in a real estate transaction However, the law was never meant to treat the definition of sale in such a narrow fashion”) (emphasis added).

73. See *Twin Towers*, 894 A.2d at 1119 (concluding, despite legislative intent to

narrow interpretation of the term “sale” both conflicts with clear contrary legislative intent and produces an absurd result by defeating the overarching goals of TOPA.⁷⁴

In addition to openly disregarding legislative intent, the Court of Appeals outrageously ignored a clear statutory provision within TOPA designed to guide this very type of judicial interpretation.⁷⁵ Specifically, the Court of Appeals cut against this provision in adopting *West End*'s restrictive “absolute passing of title” definition of “sale.”⁷⁶ When defining “sale,” the Court of Appeals failed to apply the TOPA's mandatory statutory construction provision because its subsequent interpretation of TOPA deprived tenants of the very rights it afforded them.⁷⁷ The court's “absolute transfer” construction of “sale” does the opposite of strengthening tenants' legal rights, as the narrow definition only subjects full and complete transfers of ownership in a property to TOPA's regulatory regime.⁷⁸

In stark contrast to the Court of Appeals, the District of Columbia Superior Court in *Twin Towers* properly deferred to the legislative intent and statutory purposes of TOPA when it rejected the strict reading of *West End*'s definition of “sale.”⁷⁹ The Superior Court properly recognized the duty of the judiciary to further TOPA's protections when interpreting the statute and recognized that exempting transactions like the one in *Twin Towers* from TOPA allows owners to circumvent both “the heart and

the contrary, that *West End* controls, and therefore the 95/5 transfer was not a “sale”); Brief of Appellant/Cross-Appellee in Response to the Supplemental Brief, *Twin Towers*, *supra* note 72, at 10 (urging the Court of Appeals to defer to subsequent legislative interpretation of an amended statute as evidence of legislative intent of the original statute, mandating the alteration of *West End*'s narrow definition of “sale”).

74. See *West End*, 640 A.2d at 727-28 (claiming to examine the history prompting TOPA's enactment, the problems TOPA intended to address, and the prevalent methods of statutory interpretation, yet failing to further TOPA's purposes because a narrow definition does not protect tenants as very few transfers will meet the “absolute transfer” requirement of a “sale”).

75. See Tenant Opportunity to Purchase Act (TOPA), D.C. CODE § 42-3405.11 (2001) (requiring that courts interpret any ambiguity within TOPA toward strengthening tenants' rights).

76. See *West End*, 640 A.2d at 727, n.16 (denouncing TOPA's provision requiring the interpretation of ambiguous terms to be resolved in favor of “strengthening the legal rights of tenants” because “sale” is not an ambiguous term, yet is commonly used and has a clear ascertainable meaning).

77. See TOPA § 42-3405.11 (mandating that any judiciary interpretation of the words in TOPA must be construed in a manner that strengthens tenants' rights).

78. See, e.g., *Twin Towers*, 894 A.2d at 1119 (finding that the owner of the rental apartment building had no obligations under TOPA because the owner retained a 5% interest in the property and thus no “absolute transfer” occurred).

79. See Opening Brief of Appellant/Cross-Appellee at 6, *Twin Towers Plaza Tenants Ass'n v. Capital Park Assocs.*, 894 A.2d 1113 (D.C. 2006) (Nos. 04-CV-1534, 04-CV-1575) (relying on legislative history to define “sale” as encompassing the conveyance or transfer of rights “associated with ownership”).

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substance” of TOPA and produces “obvious injustice.”⁸⁰

C. *Inconsistent Analyses and a Misapplication of the Judicial Standard in Twin Towers and Alcazar*

The Court of Appeals employed inconsistent and contradictory reasoning, failed to recognize that the transfers in the cases of *Twin Towers* and *Alcazar* constituted “sales” within the meaning of TOPA, and negligently overlooked the motives and intentions prompting the transfers at issue.⁸¹

1. *Erratic Analyses and Differing Standards*

Following *West End*, a string of TOPA cases, starting with *Columbia Plaza* in 2005 and ending with *Alcazar* in 2009, prevented tenants from exercising their right of first refusal by inconsistently interpreting the Act. Most significantly, the Court of Appeals in *Twin Towers* applied subsection (a) of TOPA and used the *West End* definition of “sale,” whereas in *Alcazar* it applied non-statutory exemptions and did not reference subsection (a) of TOPA or *West End*.⁸² The following chronological analysis illustrates how the Court of Appeals has interpreted “sale” to apply contradictory standards.

In 2005, the Court of Appeals in *Columbia Plaza* recognized that less than an absolute transfer could be a “sale.”⁸³ *Columbia Plaza* demonstrates the Court’s contemplation of situations whereby “sales” occur pursuant to a partial transfer of interest.⁸⁴ Under a restrictive standard, these transfers of

80. *See id.* at 6-7 (recognizing that constricting the definition of “sale” to exclude all transfers short of 100% complete transfer of ownership interest would render TOPA’s “tenant-protective provisions” ineffective, as nothing would trigger TOPA’s requirements).

81. *See Alcazar Tenants’ Ass’n v. Smith Prop. Holdings, L.P.*, 981 A.2d 1202, 1206 (D.C. 2009) (relying on the principles in *Wallasey* to exempt from TOPA the transfer of a rental apartment building to a trust and later to a third party); *Twin Towers*, 894 A.2d at 1118-20 (applying *West End*’s definition of “sale” to conclude that TOPA does not govern the transfer of 95% ownership interest).

82. *Compare Twin Towers*, 894 A.2d at 1118 (finding subsections (b) and (c) inapplicable and thus solely inquiring whether the transfer constituted a “sale” under subsection (a)), *with Alcazar*, 981 A.2d at 1206-07 (rejecting a subsection (a) analysis and inquiring into whether the transfers constituted a “sale” under subsection (c)).

83. *See Columbia Plaza Tenants’ Ass’n v. Columbia Plaza Ltd. P’ship*, 869 A.2d 329, 335, n.7 (D.C. 2005) (construing a written agreement as a “sale” if a transfer pursuant to the agreement leaves the original owner with minimal control over the property).

84. *See id.* at 335 (including within the definition of “sale” agreements where the owner “relinquishes control of property” by giving the third party control over the property’s equipment, supplies, maintenance, and security, yet the original owner still holds title to the property).

partial interest will never meet *West End*'s requirements or constitute a "sale" because "absolute title" will never pass when the original owner never relinquished it.⁸⁵ However, the *Columbia Plaza* court recognized that these transfers are regulated by TOPA and accordingly defined "sale" as a "change in fundamental control of ownership" and subsequently incorporated that standard into *West End*'s definition of sale in the context of written agreements.⁸⁶

One year later, the Court of Appeals in *Twin Towers* failed to extend *Columbia Plaza*'s modified interpretation of "sale" and reverted to the "absolute transfer" definition of *West End*. The *Twin Towers* court reasoned that *Columbia Plaza*'s definition could not apply because it was limited to transfers pursuant to written agreements.⁸⁷ However, the *Twin Towers* court's choice to adopt the *West End* definition is problematic because the transfer in *West End* was also pursuant to a written agreement. The facts of *Twin Towers* are just as distinguishable from *West End* as from *Columbia Plaza*.⁸⁸ Applying *West End* to *Twin Towers* while contemporaneously excluding *Columbia Plaza* from the *Twin Towers* analysis illustrates inconsistent reasoning, as the Court of Appeals sporadically defined "sale" as a change in complete ownership in some cases, while relaxing the standard to a change in control in other cases.⁸⁹ Furthermore, if the Court of Appeals consistently applied its standard and incorporated "all changes in fundamental control of ownership" as a factor of "sales" within the context of subsection (a), the transfer of the *Twin Towers* apartment building indisputably met that standard, as the transfer resulted in the conveyance of every right associated with 100% ownership.⁹⁰

In 2009, the Court of Appeals in *Gomez* remanded to a lower court the determination of whether a 99% transfer could constitute a "sale" under the

85. *See id.* at 337 (defining relinquishment of possession as giving up full, not limited or partial, control over the property).

86. *Id.* at 336.

87. *Compare id.* at 337 (categorizing the contested transfer as the conveyance of a minority interest or a 28% ownership in the property pursuant to a written agreement), with *Twin Towers*, 894 A.2d at 1118 (categorizing the contested transfer as a conveyance of a majority interest or 95% ownership interest in the property).

88. *Compare W. End Tenant Ass'n v. George Washington Univ.*, 640 A.2d 718, 730 (D.C. 1994) (finding that the transfer of total control to a third party pursuant to a written agreement constitutes a "sale"), with *Twin Towers*, 894 A.2d at 1120 (finding that the transfer of 95% interest to a third party does not constitute a "sale").

89. *Compare Columbia Plaza*, 869 A.2d at 336 (inquiring into whether a change in "fundamental control" occurred), with *Twin Towers*, 894 A.2d at 1119 (inquiring into whether "absolute transfer" occurred).

90. *See* Opening Brief of Appellant/Cross-Appellee, *Twin Towers*, *supra* note 79, at 4 (arguing that *West End* and subsequent jurisprudence defined "sale" as a transfer resulting in the fundamental change of control of ownership occurred).

“absolute transfer” definition in *West End*.⁹¹ In contrast with the Court of Appeals’ holding in *Gomez*, the Court of Appeals in *Twin Towers* failed to expand the judicial standard of “sale” from *West End* and precluded any transfer of less than 100% ownership interest from falling within TOPA’s scope.⁹² *Gomez* directly conflicts with *Twin Towers*, as the Court of Appeals in *Gomez* could not definitively hold that the transfer of 99% interest constituted a special transfer of interest rather than an absolute transfer of interest.⁹³

In the same year, the Court of Appeals in *Alcazar* found that a complex multi-step transfer fell entirely outside the scope of TOPA.⁹⁴ The court applied the *Wallasey* exemption while failing to rely on the necessary analysis of underlying motives.⁹⁵ The *Alcazar* court based its holding on flawed reasoning since the principles of *Wallasey* did not apply to the transfer in *Alcazar* because the facts between the two cases were too “drastically different” to permit proper analogy.⁹⁶

Unlike the transfer of the property in *Wallasey*, the transfer of the *Alcazar* resulted in a change in the ultimate control of the property.⁹⁷ Moreover, the transactions at issue in *Wallasey* involved only one party, whereas the transactions in *Alcazar* involved multiple parties in addition to the original owner of the *Alcazar*.⁹⁸ Motivations of purely personal

91. See *Gomez v. Independence Mgmt. of Del., Inc.*, 967 A.2d 1276, 1283 (D.C. 2009) (conceding that the transfer may be a “sale” under subsection (a)).

92. See Reply Brief for Appellees/Cross-Appellants, *Twin Towers*, *supra* note 23, at 3 (acknowledging that a literal reading of the definition of “sale” as the transfer of 100% interest markedly excludes a transfer of 99% interest).

93. See *Gomez*, 967 A.2d at 1283 (remanding to determine whether the transfer of 99% ownership interest is a “sale” within the meaning of TOPA).

94. See *Alcazar Tenants Ass’n v. Smith Prop. Holdings*, 981 A.2d 1202, 1207 (D.C. 2009) (holding that the sale of a corporation controlling a trust that owned property did not constitute a “sale” under the statute).

95. See *Wallasey Tenants Ass’n v. Varner*, 892 A.2d 1135, 1140 (D.C. 2006) (exempting from TOPA transfers not made during “arms’ length dealings,” transfers resulting in a change in the form of ownership and not an actual change in ownership or control, and transfers made solely for personal “motives of business convenience”).

96. Compare *id.* at 1137 (articulating that the contested transfer occurred when the owner of the *Wallasey* rental building transferred the property to a corporation wholly owned and operated by him), with *Alcazar*, 981 A.2d at 1205 (describing that the first transfer occurred when the *Alcazar* owner transferred the building into a trust controlled by his wholly owned corporation and the second occurred when the *Alcazar* owner sold the stock of his corporation controlling the trust to two individuals).

97. See Opening Brief of Appellants at 19, *Alcazar Tenants’ Ass’n v. Smith Prop. Holdings, L.P.*, 981 A.2d 1202 (D.C. 2009) (06-CV-0914) (distinguishing *Wallasey* by relying heavily on the fact that the transfer in *Wallasey* resulted in neither a change in control nor a change in ownership, as the original owner remained the owner after the transfer).

98. See *Wallasey*, 892 A.2d at 1141 (holding that conveying property from the original owner to a corporation wholly owned and controlled by the original owner does not result in a change in control).

economic gain prompted the transfer at issue in *Alcazar*; even the very structure of the transfer contemplated a circumvention of TOPA's requirements, whereas desires to limit liability and tax prompted the transfer at issue in *Wallasey*.⁹⁹

The above analysis demonstrates that the Court of Appeals' inconsistent interpretation of "sale" and analysis under TOPA widely varies without regard to the context of the contested transfer. Thus, the Court of Appeals' allocation of differing levels of consideration to other factors in the TOPA analysis is not surprising.

2. *Failure to Recognize the Elements of a "Sale" Were Indisputably Satisfied*

Setting aside the Court of Appeals' inconsistent reasoning and dismissal of the ultimate effect of the contested transfers in *Twin Towers* and *Alcazar*, the court failed to recognize that the contested transfers in both cases met all the elements of a "sale" under TOPA.¹⁰⁰

The court in *Twin Towers* grossly overlooked the obvious conclusion that the transfer of 95% interest met the judicial definition of "sale."¹⁰¹ The court correctly identified the key elements of a "sale" to be the passing of absolute title for consideration, but it failed to conclude that the transfer at issue satisfied this two-pronged test.¹⁰²

Unlike the Court of Appeals, the District of Columbia Superior Court correctly held that the transfer at issue in *Twin Towers* constituted a "sale," thus triggering TOPA's requirements.¹⁰³ The Superior Court believed that the transfer of 95% ownership interest in property decidedly resulted in the

99. Compare *id.* (recognizing that the motives of the parties were solely to decrease taxes and limit liability), with *Alcazar*, 981 A.2d at 1205 (conceding that the parties' motivations were for "tax reasons").

100. See *Twin Towers Plaza Ass'n v. Capital Park Assocs.*, 894 A.2d 1113, 1115-16 (D.C. 2006) (summarizing that the contentious transfer occurred when the owner of the *Twin Towers* rental apartment building deeded 95% of his interest to a third party).

101. See *id.* at 1119 (holding that a 95% transfer of interest does not equate an absolute transfer of interest). But see *Gomez v. Independence Mgmt. of Del., Inc.*, 967 A.2d 1276, 1283 (D.C. 2009) (remanding to determine whether the transfer of 99% interest is an absolute transfer of interest).

102. See *Twin Towers*, 894 A.2d at 1120 (articulating that a transfer amounting to the passing of absolute ownership signifies a "sale"); see also Opening Brief of Appellant/Cross-Appellee, *Twin Towers*, *supra* note 79, at 6-7 (structuring the transfer of the apartment building in a manner that utilized the rigid standard of "complete ownership" to establish a loophole in TOPA and transfer interests without triggering TOPA). But see Reply Brief for the Appellees/Cross-Appellants, *Twin Towers*, *supra* note 23, at 2-3 (arguing that there is no possibility to circumvent TOPA by transferring less than 100% interest (even 99%) because the *de facto* definition of a "sale" under TOPA is the transfer of 100% interest only).

103. See Opening Brief of Appellant/Cross-Appellee, *Twin Towers*, *supra* note 79, at 7 (summarizing the Superior Court's findings that, as a matter of law, the transaction was a sale).

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transfer of ownership and fundamental control over the property, as the new owner or 95% interest holder held the majority control.¹⁰⁴

Just as the Court of Appeals in *Twin Towers* failed to recognize a “sale,” the same court in *Alcazar* similarly failed to recognize that the contested transfers effectuated a “sale” for the purposes of TOPA.¹⁰⁵ Unlike the one-time transfer at issue in *Twin Towers*, the transfer at issue in *Alcazar* consisted of two transfers.¹⁰⁶ The transfer of the entire ownership interest in the Alcazar building, including its title, from the original owner to a new and unrelated entity clearly meets the definition of “sale” as defined by *West End* and its progeny.¹⁰⁷ Ultimately, the transaction at issue resulted in the full conveyance of the Alcazar building from Smith Property Holdings to an outside party and thus clearly constituted a “sale.”¹⁰⁸

3. *Overlooking the Inexcusable: Ignoring Deceptive Motives Prompting the Transfers*

The Court of Appeals in both *Twin Towers* and *Alcazar* erroneously overlooked the parties’ underlying motives and intentions that prompted the transfers at issue.¹⁰⁹ This failure directly contradicts the reasoning of the court in *Wallasey* and *Gomez*.¹¹⁰

In *Wallasey*, the Court of Appeals deferred exclusively to the transferor’s

104. See *id.* (labeling the building owner’s position as “absurd” when the owner attempted to define sale as strictly the transfer of 100% of all interests, and anything short of that was not a sale).

105. See *Alcazar Tenants’ Ass’n v. Smith Prop. Holdings, L.P.*, 981 A.2d 1202, 1206 (D.C. 2009) (holding that the transfer of title was not a sale under TOPA because absolute title passed directly to the original grantor).

106. See *id.* (recognizing that the first transfer occurred when the owner transferred the building into a trust and the subsequent transfer occurred when the owner sold his ownership interest).

107. See Opening Brief of Appellants, *Alcazar*, *supra* note 97, at 15 (arguing that the transfer of title from Smith Property Holdings and Smith Property Holdings’ Trust to an entirely distinct and new organization effectuated the transfer of property and thus met the definition of a “sale” because the owner exchanged absolute title to the property for consideration of value).

108. See Reply Brief of Appellants at 10, *Alcazar*, 981 A.2d 1202 (proclaiming that the seller of the Alcazar agreed in a “Purchase and Sale Agreement” to transfer 100% of his ownership interest and ownership benefits to a third party and thus “sold” the Alcazar pursuant to the “absolute transfer” definition of “sale” in *Twin Towers*’ and *West End*).

109. See, e.g., *Alcazar*, 981 A.2d at 1206 (examining testimony demonstrating the parties intended to circumvent TOPA); *Twin Towers Plaza Tenants Ass’n v. Capital Park Assocs.*, 894 A.2d 1113, 1119 (D.C. 2006) (holding that the transfer of 95% ownership interest is not a sale even though the parties expressly intended to avoid TOPA’s requirements). But see *Gomez v. Independence Mgmt. of Del., Inc.*, 967 A.2d 1276, 1280 (D.C. 2009) (describing the parties’ deliberate intentions to circumvent TOPA).

110. See *Wallasey Tenants Ass’n, v. Varner*, 892 A.2d 1135, 1140 (D.C. 2006) (exempting transfers prompted by “motives of business convenience” from complying with TOPA).

underlying reasons for transferring his property and established that motives can be the dispositive factor categorizing a transfer as a non-sale.¹¹¹ Effectively, *Wallasey* obliges the judiciary to inquire into the motives underlying the transfer of rental property when determining whether the transfer is exempt from TOPA's requirements.¹¹² In not giving proper weight to the parties' intentions and underlying motivations, the Court of Appeals selectively applied portions of previous rationales, contravened previous holdings, and disregarded TOPA's protections.¹¹³

Unlike the Court of Appeals in both *Twin Towers* and *Alcazar*, the Superior Court in *Twin Towers* rightfully recognized the importance of subjective motives in prompting a transfer and, consistent with precedential reasoning, deferred to the parties' intentions to avoid TOPA when holding that the transfer constituted a "sale."¹¹⁴ Yet, the Court of Appeals in *Twin Towers* strayed from this deferential determination and rejected the Superior Court's proper examination of the intent of the parties and the motives prompting the transaction.¹¹⁵

The Court of Appeals in *Alcazar* further strayed from accepted jurisprudence by applying *Wallasey*'s motive-based exceptions yet failing to examine the parties' actual motives.¹¹⁶ *Wallasey*'s exemptions can only preclude TOPA after an examination of the motives prompting the transfer; thus, the test for determining whether the *Wallasey* standard is satisfied depends upon the motives of the parties.¹¹⁷ The Court of Appeals in *Alcazar* failed even to consider the motives of the parties, yet held that the transfer did not constitute a "sale" for the purposes of TOPA because

111. *See id.* (relying on personal motives to place a transfer effectuated in furtherance of those motives outside the scope of TOPA).

112. *See generally id.* (relying solely on the rental housing owner's subjective motives prompting the transfer to determine whether the transfer fell within one of TOPA's exemptions).

113. *See* Brief of Appellant/Cross-Appellee in Opposition with Respect to the Cross-Appeal, *Twin Towers*, *supra* note 55, at 20 (quoting the Court of Appeals' self-imposed prohibition against allowing a "pure formality" that creates statutory loopholes to defeat "important legislative policies").

114. *See* Opening Brief of Appellant/Cross-Appellee, *Twin Towers*, *supra* note 79, at 7 (supporting the Superior Court's conclusion that this transaction is a "sale" because avoiding TOPA's protections of tenants' rights was the *sole reason* for the transaction).

115. *See id.* (emphasizing that the owner's sole reason for transferring the property was to circumvent TOPA's protections).

116. *See* Reply Brief of Appellants, *Alcazar*, *supra* note 108, at 10 (revealing that the parties structured the transfer precisely to avoid triggering TOPA's right of first refusal and thus *Wallasey* cannot apply because *Wallasey* did not involve a transfer to an independent third party).

117. *See id.* at 13-14 (noting that intent is not applicable if the standard for determining whether a "sale" occurred is based upon whether the transaction involved a transfer of absolute title, but intent is very relevant in cases that focus on applying *Wallasey* and the motives behind the transfer).

Wallasey governed.¹¹⁸ However, the Court of Appeals' failure to examine motives in the *Alcazar* case effectively renders the *Wallasey* exemptions invalid because the exemptions can only be applied if the motives so demand.¹¹⁹ To apply a judicial exemption without analyzing the dispositive factors determining whether the exemption's elements are met is a misguided application of law; thus, the Court of Appeals failed to defer to the parties' motives.¹²⁰

D. Judicial Sponsored Circumvention of TOPA: The Effects of the Improper Standard and What the Court of Appeals Should Have Done

The Court of Appeals' restrictive application of its "absolute transfer" standard provides rental housing owners with a legal means of circumventing TOPA's statutory requirements.¹²¹ Ultimately, the judicial standard defeats the purposes of TOPA.¹²² Limiting "sales" to one-time conveyances of owners' entire interest in rental housing accommodations established a history of jurisprudence that indirectly affords developers and rental accommodation owners a means of transferring property without regulation.¹²³ These transfers directly result in the subjugation of low-income tenants to the unregulated actions of new management or owners, and produce an absurd effect contrary to the purposes of TOPA.¹²⁴

The Court of Appeals made multiple errors when interpreting TOPA. The most devastating of these errors was the Court of Appeals' failure to

118. See *Alcazar Tenants' Ass'n v. Smith Prop. Holdings, L.P.*, 981 A.2d 1202, 1206 (D.C. 2009) (finding that the transfer from the original owner to a trust controlled by the owner did not constitute a "sale" but was merely a change in the form of ownership).

119. See Reply Brief of Appellants, *Alcazar*, *supra* note 108, at 14 (questioning judicial discretion when the judiciary fails to examine subjective motives underlying a consequently subjective exemption).

120. See Opposition Brief of the Appellees at 10, *Alcazar*, 981 A.2d 1202 (distinguishing the Court of Appeals' failure to examine motives in *Twin Towers* because this case applies *Wallasey*, and *Twin Towers* does not).

121. See *id.* at 23 (recognizing that by ignoring the motives of the parties or the parties' attempts to "evade" TOPA's requirements, the Court of Appeals enforces a loophole in TOPA).

122. See Brief of Appellant/Cross-Appellee in Response to the Supplemental Brief, *Twin Towers*, *supra* note 72, at 2 (concluding that a rigid definition of "sale" would eviscerate TOPA's goals, as it ensures rental housing owners could *always* structure a transfer to avoid conveying all their interest and thus circumvent the "complete ownership" test, essentially making TOPA's mandatory requirements voluntary).

123. See *generally Alcazar*, 981 A.2d 1202 (demonstrating that the result of applying the Court of Appeals' faulty narrow standard excluded a transfer that ultimately had the same effect of a one-time "sale" because the multi-step transfer resulted in the full conveyance from the original owner to a third party).

124. See Opening Brief of Appellant/Cross-Appellee, *Twin Towers*, *supra* note 79, at 6-7 (reasoning that if the trial court had found the transaction was not a "sale," the holding would be contrary to legislative intent, absurd, and produce "obvious injustice").

defer to the overall effect of the transfers at issue. The Court of Appeals' failure in both *Twin Towers* and *Alcazar* resulted in the furtherance of property owners' interests by promoting development at the expense of tenants.¹²⁵ The court in *West End* refused to condone attempts to "disguise" the nature of the transaction.¹²⁶ Subsequent holdings likewise obligate the judiciary to consider the overarching effect of transfers when inquiring into whether a "sale" occurred for the purpose of TOPA.¹²⁷

The failure to defer to the true nature of the contested conveyances excluded multiple types of transfers that ultimately have the same effect as a one-time "sale," as exemplified in the holdings of *Twin Towers* and *Alcazar*. The holding of *Twin Towers* effectively resulted in the transfer of nearly complete management control to the new third-party owner and precluded the application of TOPA.¹²⁸ The Court of Appeals in *Alcazar* examined each portion of the multi-step transaction as individual, separate, and unrelated conveyances yet ignored the end result.¹²⁹ If the court in *Alcazar* had looked to the true nature of the transactions or examined the individual transactions as a whole, it would have been unable to avoid the clear conclusion that a "sale" occurred because the original grantor was not the owner of the entities receiving the transfers.¹³⁰

Had the Court of Appeals more broadly applied its "absolute transfer" standard by examining the nature and ultimate effect of these transfers, it could not dispute that each of the transfers in *Twin Towers* and *Alcazar* constituted an "absolute transfer" of the rental housing accommodation and thus met the definition of "sale."¹³¹ Only an examination of the transactions as a whole results in the conclusion that the transfer in both

125. See *Alcazar*, 981 A.2d at 1206 (refusing to examine the effect of the transfer as one factor in determining whether a "sale" occurred).

126. See *W. End Tenant Ass'n v. George Washington Univ.*, 640 A.2d 718, 729-30 (D.C. 1994) (averring that the transaction at issue would have been construed as a "sale" if the parties had attempted to structure the agreement solely for the purpose of avoiding TOPA).

127. See, e.g., *Wallasey Tenants Ass'n v. Varner*, 892 A.2d 1135, 1141 (D.C. 2006) (requiring courts to examine the "true nature" of the transaction at issue when determining whether it constituted a "sale").

128. See *Twin Towers Plaza Tenants Ass'n v. Capital Park Assocs.*, 894 A.2d 1113, 1119 (D.C. 2006) (recognizing that the transfer of the property ultimately resulted in the transfer of absolute title one year after the conveyance of the 95% interest).

129. See *Alcazar*, 981 A.2d at 1206-07 (holding that TOPA was not applicable because neither individual transfer constituted a sale).

130. See Reply Brief of Appellants, *Alcazar*, *supra* note 108, at 11 (distinguishing *Wallasey* because, in *Alcazar*, the transaction directly resulted in a change in ownership and control, and the parties intentionally structured the transaction to circumvent TOPA's obligations and thus the transfer clearly was not a restructuring for "business convenience").

131. See Opening Brief of Appellants, *Alcazar*, *supra* note 97, at 6-7 (articulating that the parties carefully designed the transfers to result in the full conveyance of the property).

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cases effected a complete change in the form of ownership.¹³² The Council also recognized this oversight as significant and worthy of correction. The Council subsequently amended TOPA to require the judiciary to examine the overall substance of the transfers at issue. If the Court of Appeals had properly interpreted TOPA and consistently applied its own standard, the Council would not have needed to amend TOPA.

IV. POLICY RECOMMENDATIONS

The judicial standard effectively defeats the purposes of TOPA by advancing a restrictive standard of “sale,” as opposed to furthering TOPA’s actual purpose: to strengthen tenants’ rights.¹³³ This Comment calls for a reform to TOPA to ensure TOPA’s statutorily guaranteed protections *actually* protect vulnerable tenants.¹³⁴

TOPA provides a solid foundation for protecting tenants, but its regulatory regime has limited powers because the Court of Appeals incorporated a judicial standard that prevents TOPA from serving as an effective regulatory mechanism that cuts against the negative effects of conversion and gentrification.¹³⁵ The Council acknowledged that the judicial standard was misconstrued and indirectly furthers gentrification by providing housing accommodation owners a means of circumventing TOPA’s statutory requirements.¹³⁶ However, acknowledgement of an overly narrow standard is insufficient, and the Council must reevaluate TOPA and promulgate clearer provisions to ensure TOPA’s purposes are fulfilled.¹³⁷

132. See generally *Alcazar*, 981 A.2d 1202 (describing the transfer of the Alcazar in stages so as to avoid TOPA while underhandedly planning to effectuate a “sale” just as contemplated by TOPA but in a manner that disguised the genuine nature of the transfers).

133. See *Columbia Plaza Tenants’ Ass’n v. Columbia Plaza Ltd. P’ship*, 869 A.2d 329, 332 (D.C. 2005) (recognizing that courts should give TOPA “sensible construction” or an interpretation that does not result in “obvious injustice,” thus the judicially defined terms must not be at a variance with the overarching policy of TOPA).

134. See *Powell & Spencer*, *supra* note 3, at 450 (accusing states of “fueling” gentrification through the removal of development regulations, legislative inaction, and judicial sanction).

135. See Brief of Appellant/Cross-Appellee in Opposition with Respect to the Cross-Appeal, *Twin Towers*, *supra* note 55, at 9 (recognizing that the current definition of “sale” allows owners to avoid TOPA by retaining, for example, a meager 1% interest in the property).

136. See Rental Housing Conversion and Sale Act of 1980, D.C. CODE § 42-3401.01 (2001) (acknowledging that the housing crisis persists largely due to ineffective conversion controls).

137. See *Powell & Spencer*, *supra* note 3, at 459 (providing statistics demonstrating a 50% increase in the cost of housing in “gentrified areas,” whereas other areas of the District of Columbia only experience a 15% increase).

The Council's attempts to address the judicial standard in 2005 failed, as it still allows for the judicial standard to govern transfers pursuant to subsection (a). The Council needs to readdress the judicial standard by promulgating amendments to broaden the scope of TOPA.¹³⁸ The new provision that now requires an examination of the overall effect of the transfer seems to conflict directly with TOPA itself. The Council must clearly define the term "sale" in order to invalidate the holdings of *West End* and its progeny. TOPA's purposes will continue to be defeated if the Council and the judiciary fail to redefine "sale," as vulnerable populations cannot avail themselves of TOPA's protections and will continue to suffer the negative social effects of unregulated conversion and gentrification.¹³⁹

V. CONCLUSION

The District of Columbia Court of Appeals wrongfully defined "sale" and improperly applied its standard to hold against the interests of tenants.¹⁴⁰ In allowing property owners to transfer almost all of their ownership interest in property without affording the tenants their statutory right of first refusal, the judiciary is sponsoring the development of the District of Columbia at the cost of negatively impacting the vulnerable populations TOPA is meant to protect.¹⁴¹ The misapplication of the judicial test for determining whether a transaction is a "sale" under TOPA has resulted in the furtherance of gentrification, judicial-sponsored injustices, and, ultimately, rendered TOPA ineffective.¹⁴² To prevent this urban segregation and protect vulnerable populations, the Council needs to more affirmatively amend TOPA by directly defining "sale" in a way that expressly overrules the judicial standard.

138. See Brief of Appellant/Cross-Appellee in Opposition with Respect to the Cross-Appeal, *Twin Towers*, *supra* note 55, at 12-13 (showing that the Council promulgated the 2005 amendments only after extensive hearings resulted in the Council agreeing that TOPA will effectively protect tenants if "sale" includes conveyances effectuating the "actual transfer of possession and control of a rental building").

139. See O'Toole & Jones, *supra* note 28, at 368-69 (summarizing the "overarching purpose" of TOPA as stopping the "rapid loss of affordable rental housing").

140. See, e.g., *Twin Towers Plaza Tenants Ass'n v. Capital Park Assocs.*, 894 A.2d 1113, 1119 (D.C. 2006) (finding that the owner of the rental housing did not need to comply with TOPA and thus did not need to provide the tenants with their statutory right of first refusal).

141. Cf. Powell & Spencer, *supra* note 3, at 458-59 (reiterating that the housing crisis in the District of Columbia continues today by providing statistics that 56,000 African Americans have fled the city; specifically, these "departing blacks" account for "nearly all of the city's population loss").

142. See, e.g., Feldman, *supra* note 8, at 86 (explaining how the government's failure to effectively regulate conversion results in unregulated urban development and adversely impacts low-income populations).